

PROPOSED
CODE OF MASSACHUSETTS REGULATIONS
TITLE 330: DEPARTMENT OF AGRICULTURAL RESOURCES
CHAPTER 30.00: ADMINISTRATIVE PENALTIES

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30.01: Definitions

As used throughout 330 CMR 30.00, the following terms shall have the following meanings, unless the context clearly indicates otherwise.

Animal Health Laws means M.G.L. c. 129 and all rules and regulations adopted thereunder, including without limitation any section of 330 CMR adopted under authority of M.G.L. c. 129.

Applicant means any Person who has applied for a License.

Commissioner means the Commissioner of the Department and any of his or her designees.

Department means the Massachusetts Department of Agricultural Resources.

Enforcement Action means a proceeding brought by the Department against one or more Persons for one or more Violations.

Fine means an administrative fine that the Department proposes to assess and collect pursuant to M.G.L. c. 129, § 37 and 330 CMR 30.00.

Fine Assessment Notice means a written notice informing a Respondent that the Commissioner is proposing to assess a Fine.

License means any license, permit, certificate, registration, charter, authority, approval, or other form of permission required by the Department pursuant to the Animal Health Laws.

Licensee means any Person who has received a License from the Department.

Notice of Violation means a written notice given to a Person by the Department pursuant to 330 CMR 30.05 stating that the Person has failed to comply with one or more Requirements.

Offense means an instance of a Violation.

Order means a lawful command issued by the Department under authority of the Animal Health Laws.

Pattern of Noncompliance means a Pattern of Noncompliance as determined by the Department pursuant to 330 CMR 30.06.

Person means any individual, trust, corporation, partnership, or other legally recognized entity, and any officer, employee, representative or agent thereof.

Record means any document and data that the Animal Health Laws, an Order or a License requires a Person to keep or provide.

Requirement means any obligation or prohibition established by the Animal Health Laws, an Order, or a License.

Respondent means a Person addressed in a Notice of Violation or a Fine Assessment Notice, or any other Person subject to an Enforcement Action.

Violation means engaging in any business or other activity without a License, engaging in any activity prohibited by any Requirement, or failing to comply with any Requirement.

30.02: License Denial, Suspension or Revocation

The Commissioner may deny, suspend or revoke any License, effective pending resolution of any appeal unless otherwise ordered by a court of competent jurisdiction, if any of the following applies:

- (1) The Applicant or Licensee has, on more than two occasions within the past five years, done any of the following:
 - (a) Failed to provide Records to the Department within thirty days of a written request from the Department;
 - (b) Failed to properly and accurately prepare any Record;
 - (c) Falsified any Record;
 - (d) Failed to maintain any Record;
- (2) The Commissioner otherwise finds that the Applicant or Licensee has consistently or continually failed to keep or produce Records; or
- (3) The Licensee has failed to timely pay any Fine.

30.03: Issuance and Receipt of Notices

Each notice issued by the Department to a Person pursuant to M.G.L. c. 129, § 37 and 330 CMR 30.00 shall be served in hand, left at the last known address or place of business, by certified mail, return receipt requested, or by regular mail. Each notice shall be deemed issued by the Department and received by the Person to whom it was delivered as follows:

- (1) If served in hand, on the date when delivered personally to the Person;
- (2) If left at the last known address or place of business, on the date when left at the Person's last known address or place of business in the Commonwealth;
- (3) If given by certified mail, return receipt requested, on either:
 - (a) The date signed for;
 - (b) The date returned by the U.S. Postal Service to the Department as unclaimed; or
 - (c) Another date determined by the Department if the Department is persuaded that the notice was not claimed for reasons beyond the control of the Person to whom the notice was sent; and
- (4) If given by regular mail, on either:
 - (a) The third business day after it is mailed to the Person; or
 - (b) Another date determined by the Department if the Department is persuaded that the Person to whom the notice was mailed did not receive the notice within three business days of mailing.

30.04: Preconditions for Assessment of Fines

A Fine may be assessed only for a Violation that occurred after September 5, 2002, constituted a Violation of a Requirement that was in effect at the time of Violation, and was any of the following:

- (1) The subject of a previous Notice of Violation, as set forth in 330 CMR 30.05;
- (2) Part of a Pattern of Noncompliance as set forth in 330 CMR 30.06;
- (3) Willful and not the result of error;
- (4) Caused a significant threat to human or animal health; or
- (5) The breach of any agreement previously entered into between the Respondent and the Department.

30.05: Notice of Violation

- (1) A Notice of Violation shall describe one or more Requirement(s) in effect when the Notice of Violation was given, and for each such Requirement, the occasions that the Department

- asserts the Respondent was not in compliance therewith and specify a reasonable deadline or deadlines by which the Respondent shall:
- (a) Come into compliance with each Requirement; or
 - (b) If the Department deems appropriate, submit a written proposal to the Department stating how and when the Respondent proposes to come into compliance by a specific and reasonable deadline.
- (2) If the Department has issued the Respondent a Notice of Violation, the Department may assess a Fine against any Respondent when the criteria set forth in 330 CMR 30.04 are met and after the deadline specified in the Notice of Violation has passed the following is true:
- (a) The Respondent has not:
 - 1. Come into compliance with each Requirement; or
 - 2. If the Department deems appropriate, submitted a written proposal setting forth how and when the Respondent proposes to come into compliance by a specific and reasonable deadline.
 - (b) The Respondent continues or repeats the Violation.
- (3) In determining whether to assess a Fine after a Notice of Violation has been given, the Department may consider whether five years have elapsed between the date of the most recent Notice of Violation and the date of the Fine Assessment Notice, and any other factors that it deems relevant, including but not limited to the factors listed in 330 CMR 30.07, regarding the Violation for which the Fine would be assessed and other Violations described in prior Notice of Violations:

30.06: Pattern of Noncompliance

A Fine may be assessed without the prior issuance of a Notice of Violation if the criteria set forth in 330 CMR 30.04 are met and the violation is part of a Pattern of Noncompliance. In determining whether the Violation is part of a Pattern of Noncompliance, the Department may consider, but shall not be limited to considering, any or all of the following criteria:

- (1) Whether, at least once in the past five years, the Department has issued the Respondent a Notice of Violation asserting an identical or substantially similar Violation;
- (2) Whether, at least twice in the past five years, the Department has issued the Respondent a Notice of Violation asserting one or more different Violations;
- (3) Whether the current Violation and the other Violations described in the prior Notice of Violations, considered together, indicate a potential threat to human or animal health;
- (4) Whether at least twice in the past year, the Respondent has committed two or more identical or substantially similar Violations; and
- (5) Any of the factors listed in 330 CMR 30.07.

30.07: Assessing a Fine

- (1) If the criteria set forth in 330 CMR 30.04 are met, the Department may consider any factors that it deems relevant in determining whether to assess a Fine. Without limiting the

foregoing, the Department may consider the following factors regarding each Violation for which a Fine would be assessed:

- (a) What the Respondent did to prevent the Violation or reoccurrence of the Violation;
 - (b) What the Respondent did, and how quickly the Respondent acted, to come into compliance after the occurrence of the Violation;
 - (c) What the Respondent did, and how quickly the Respondent acted, to avert, remedy or mitigate whatever harm might have resulted from the Violation; and
 - (d) The actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other Person, as a result of the occurrence of the Violation.
- (2) The Department need not issue a Notice of Violation prior to the assessment of a Fine for Violations that meet the criteria of 330 CMR 30.04(2) through (5) inclusive.

30.08: Rules Regarding Amount of Fine

- (1) No Fine shall exceed \$500 per Offense or \$10,000 per Enforcement Action.
- (2) Each day during which each Violation occurs or continues shall constitute a separate Offense, subject to a separate Fine. The number of days which shall constitute a separate Offense and shall be subject to a separate Fine shall be calculated as follows:
- (a) If Respondent was given a Notice of Violation, the number of days shall be the sum of each day during which Violation occurred or continued, commencing with the day that Respondent received the Notice of Violation, and ending on the date of the Fine Assessment Notice, and each day calculated pursuant to 330 CMR 30.08(3).
 - (b) If the Respondent was not given a Notice of Violation, the number of days shall be the sum of one day, and each day calculated pursuant to 330 CMR 30.08(3).
- (3) If, after receiving a Fine Assessment Notice, the Respondent does not come into compliance with any Requirement described in said Fine Assessment Notice, and does not make reasonable efforts to come into compliance with said Requirement, the Department may, subject to the provisions of 330 CMR 30.13, assess a Fine for each day during which such Violation occurs or continues, as follows:
- (a) Commencing the day the Fine Assessment Notice was issued; and
 - (b) Ending on the day the Respondent comes into compliance with said Requirement, or, if earlier, the day the adjudicatory proceeding on the Fine Assessment Notice is concluded.

30.09: Factors Used to Determine Amount of Fine

In determining the amount of each Fine for any Violation, the Department may consider any of the following factors:

- (1) The actual and potential impact of the Violation on human or animal health, safety, and welfare, and the environment;

- (2) The actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other Person as a result of the Violation;
- (3) Whether the Respondent tried to prevent the Violation or reoccurrence of the Violation;
- (4) Whether the Respondent tried to promptly correct the Violation;
- (5) Whether the Respondent tried to remedy and mitigate whatever harm might have been done as a result of the Violation;
- (6) Whether the Respondent has committed prior Violations;
- (7) Whether the Fine will exceed the cost of compliance;
- (8) Whether the Fine will deter future Violations by making compliance less costly than noncompliance;
- (9) The public interest; and
- (10) Any other factors the Department deems relevant, provided that said factors are described in the Fine Assessment Notice.

30.10: Fine Assessment Notice

- (1) Whenever the Department proposes to assess a Fine, it shall issue to the Respondent a Fine Assessment Notice that shall include:
 - (a) A concise statement of the alleged act or omission for which such Fine would be assessed;
 - (b) Each Requirement which has not been complied with as a result of such alleged act or omission;
 - (c) The money amount proposed to be assessed as a Fine for each alleged act or omission for which the Fine would be assessed;
 - (d) A statement that the Respondent has a right to an adjudicatory hearing on such assessment;
 - (e) A statement of the procedures that Respondent must follow to avoid being deemed to have waived the right to an adjudicatory hearing under 330 CMR 30.12(2); and
 - (f) A statement of how and by when the Fine must be paid if the Respondent waives the right to an adjudicatory hearing.
- (2) Each Fine Assessment Notice shall be issued in accordance with 330 CMR 30.03.

30.11: Right to Adjudicatory Hearing; Waiver; Hearing Rules

- (1) Subject to the waiver provisions of 330 CMR 30.11(2), whenever the Department proposes to assess a Fine, the Respondent shall have the right to an adjudicatory hearing.
- (2) Whenever the Department proposes to assess a Fine, the Respondent shall be deemed to have waived the right to an adjudicatory hearing unless, within 21 days of the date of issuance of the Fine Assessment Notice, the Respondent files with the Department a written statement that denies the occurrence of the acts or omissions alleged in the Fine Assessment Notice, or asserts that the amount of the proposed Fine is excessive. In the event that the Respondent files this timely written statement, the Department shall, within

30 days of receipt of this statement, notify the Respondent of the date, place and time of an adjudicatory hearing.

- (3) Each adjudicatory hearing under 330 CMR 30.00 shall follow the Standard Rules of Adjudicatory Procedure for informal hearings at 801 CMR 1.02 et. seq.

30.12: Paying a Fine

Each Fine shall be paid by certified check, cashier's check, or money order payable to the order of the Commonwealth of Massachusetts. Unless otherwise provided by the Department in writing, each Fine shall be paid in full no later than 30 days after the following:

- (1) The date of the issuance of the Fine Assessment Notice, if the Respondent waives the right to an adjudicatory hearing;
- (2) The date of a settlement agreement between the Respondent and the Department, if the Respondent and the Department terminate the hearing process with a settlement agreement that imposes a Fine;
- (3) The date that the Commissioner signs a final decision imposing a Fine, if the Respondent does not commence an action for judicial review under M.G.L. c. 30A within 30 days of this date; or
- (4) The date that a court upholds the Fine or such other date as the court may prescribe, if Respondent commences a civil action for review under M.G.L. c. 30A and the court upholds the Fine in whole or in part.

30.35: Failure to Pay a Fine

- (1) The Department may collect any unpaid Fine by filing a civil collection action in district or superior court, or through any other means available to state agencies.
- (2) The Department may, subject to the provisions of chapter 30A, section 13, deny, suspend or revoke any License for failure to timely pay a Fine.

REGULATORY AUTHORITY

330 CMR 30.00: M.G.L. c. 129, § 37.

PUBLIC HEARING NOTICE

ANIMAL HEALTH REGULATIONS: PROPOSED. THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF AGRICULTURAL RESOURCES HEREBY GIVES A NOTICE OF PROPOSED PROMULGATION OF REGULATIONS at 330 Code of Massachusetts Regulations 30.00 ("330 CMR 30.00"), "ADMINISTRATIVE PENALTIES" pursuant to its authority established in Massachusetts General Laws (M.G.L.) Chapter 129, Section 37. The Department will conduct two public hearings on Tuesday, March 23, 2004 to consider the proposed regulations as follows:

11:15 a.m. – 12 p.m. Waltham 4-H Center (also known as Waltham Field Station), 240 Beaver Street, Waltham, MA in the Auditorium

3:30 p.m. – 4:15 p.m. Springfield Technical Community College, 1 Armory Square, Springfield, MA, Building 2, Room 702

Recent legislation (M.G.L. 129, section 37) provided the Department with the ability to assess administrative penalties upon those it regulates. The legislation suggested the promulgation of regulations. These new regulations establish criteria for imposing such administrative penalties and clarify, for regulated parties, the process the Department will follow in assessing administrative penalties.

Copies of proposed regulations can be obtained at www.mass.gov/agr Department of Agricultural Resources, 251 Causeway Street, Suite 500, Boston, MA 02114 or by calling Ms. Esther Wegman 617-626-1795. Written comments will be accepted at the hearings and thereafter until close of business on April 14, 2004 and should be addressed to Mr. Kent Lage, Department of Agricultural Resources, 251 Causeway Street, Suite 500, Boston, MA 02114 by regular mail or email Kent.Lage@state.ma.us , or fax 617-626-1850.

By: Douglas P. Gillespie, Commissioner.